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§ 383.1 General.

(a) *Scope.* This part 383 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of certain ephemeral recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period commencing from the inception of the Licensees' Services and continuing through December 31, 2015.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections and the rates and terms of this part.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this part to transmissions with the scope of such agreements.

[72 FR 72254, Dec. 20, 2007, as amended at 75 FR 14075, Mar. 24, 2010]

§ 383.2 Definitions.

For purposes of this part, the following definitions shall apply:

(a) *Applicable Period* is the period for which a particular payment to the designated collection and distribution organization is due.

(b) *Bundled Contracts* means contracts between the Licensee and a Provider in which the Service is not the only content licensed by the Licensee to the Provider.

(c) *Copyright Owner* is a sound recording copyright owner who is entitled to receive royalty payments under 17 U.S.C. 112(e) or 114(g).

(d) *License Period* means the period commencing from the inception of the Licensees' Services and continuing through December 31, 2015.

(e) *Licensee* is a person that has obtained statutory licenses under 17 U.S.C. 112(e) and 114, and the implementing regulations, to make digital audio transmissions as part of a Service (as defined in paragraph (h) of this section), and ephemeral recordings for use in facilitating such transmissions.

(f) *Provider* means a "multichannel video programming distributor" as that term is defined in 47 CFR 76.1000(e); notwithstanding such definition, for purposes of this part, a Provider shall include only a distributor of programming to televisions, such as a cable or satellite television provider.

(g) *Revenue.* (1) "Revenue" means all monies and other considerations, paid or payable, recognizable during the Applicable Period as revenue by the Licensee consistent with Generally Accepted Accounting Principles ("GAAP") and the Licensee's past practices, which is derived by the Licensee from the operation of the Service and shall be comprised of the following:

(i) Revenues recognizable by Licensee from Licensee's Providers and directly from residential U.S. subscribers for Licensee's Service;

(ii) Licensee's advertising revenues recognizable from the Service (as billed), or other monies received from sponsors of the Service if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;

(iii) Revenues recognizable for the provision of time on the Service to any third party;

(iv) Revenues recognizable from the sale of time to Providers of paid programming, such as infomercials, on the Service;

(v) Where merchandise, service, or anything of value is receivable by Licensee in lieu of cash consideration for the use of Licensee's Service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;

(vi) Monies or other consideration recognizable as revenue by Licensee

from Licensee's Providers, but not including revenues recognizable by Licensee's Providers from others and not accounted for by Licensee's Providers to Licensee, for the provision of hardware for the Service by anyone and used in connection with the Service;

(vii) Monies or other consideration recognizable as revenue for any references to or inclusion of any product or service on the Service; and

(viii) Bad debts recovered regarding paragraphs (g)(1)(i) through (vii) of this section.

(2) "Revenue" shall include such payments as set forth in paragraphs (g)(1)(i) through (viii) of this section to which Licensee is entitled but which are paid or payable to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's Providers for the Service. Licensee shall be allowed a deduction from "Revenue" as defined in paragraph (g)(1) of this section for bad debts actually written off during the reporting period.

(h) A *Service* is a non-interactive (consistent with the definition of "interactive service" in 17 U.S.C. 114(j)(7)) audio-only subscription service (including accompanying information and graphics related to the audio) that is transmitted to residential subscribers of a television service through a Provider which is marketed as and is in fact primarily a video service where

(1) Subscribers do not pay a separate fee for audio channels.

(2) The audio channels are delivered by digital audio transmissions through a technology that is incapable of tracking the individual sound recordings received by any particular consumer.

(3) However, paragraph (h)(2) of this section shall not apply to the Licensee's current contracts with Providers that are in effect as of the effective date of this part if such Providers become capable in the future of tracking the individual sound recordings received by any particular consumer, provided that the audio channels continued to be delivered to Subscribers by digital audio transmissions and the Licensee remains incapable of tracking the individual sound recordings received by any particular consumer.

(i) *Subscriber* means every residential subscriber to the underlying service of the Provider who receives Licensee's Service in the United States for all or any part of a month; provided, however, that for any Licensee that is not able to track the number of subscribers on a per-day basis, "Subscribers" shall be calculated based on the average of the number of subscribers on the last day of the preceding month and the last day of the applicable month, unless the Service is paid by the Provider based on end-of-month numbers, in which event "Subscribers" shall be counted based on end-of-month data.

(j) *Stand-Alone Contracts* means contracts between the Licensee and a Provider in which the only content licensed to the Provider is the Service.

[72 FR 72254, Dec. 20, 2007, as amended at 75 FR 14075, Mar. 24, 2010]

§ 383.3 Royalty fees for public performances of sound recordings and the making of ephemeral recordings.

(a) *Royalty rates.* Royalty rates for the public performance of sound recordings by eligible digital transmissions made over a Service pursuant to 17 U.S.C. 114, and for ephemeral recordings of sound recordings made pursuant to 17 U.S.C. 112(e) to facilitate such transmissions during the License Period, are as follows. Each Licensee will pay, with respect to content covered by the License that is provided via the Service of each such Licensee:

(1) For Stand-Alone Contracts, the greater of:

(i) 15% of Revenue, or

(ii) The following monthly minimum payment per Subscriber to the Service of such Licensee—

(A) From inception through 2006: \$0.0075

(B) 2007: \$0.0075

(C) 2008: \$0.0075

(D) 2009: \$0.0125

(E) 2010: \$0.0150

(F) 2011: \$0.0155

(G) 2012: \$0.0159

(H) 2013: \$0.0164

(I) 2014: \$0.0169

(J) 2015: \$0.0174 and

(2) For Bundled Contracts, the greater of: